

No. 11179

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. S. LACK,

Appellant,

vs.

WESTERN LOAN AND BUILDING COM-
PANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 28 1945

PAUL P. O'BRIEN,¹
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HARRY W. HORTON

218 Rehkopf Bldg.

El Centro, Calif.

For Appellee:

M. PERELLI-MINETTI

704 S. Spring St.

Los Angeles 14, Calif.

H. L. MULLINER

817 Continental Bank Bldg.

Salt Lake City 1, Utah [1*]

In the District Court of the United States for the
Southern District of California, Central Di-
vision

In Equity
No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COM-
PANY, a corporation,

Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY,
Ltd., a corporation,

Defendants

In Equity
No. 84 S. D. Civil O'C

F. S. LACK,

Plaintiff,

vs.

WESTERN LOAN AND BUILDING COM-
PANY, a corporation,

Defendant.

FINAL DECREE

The above entitled cause, No. 1301 O'C Civil, Central Division, having been filed in this court, and the above entitled cause, No. 84 O'C Civil, Southern Division, having been commenced in the Superior Court of the State of California in and for the County of Imperial, No. 19637, and thereafter removed to this court, and the said two causes

having been consolidated and tried together before the Hon. J. F. T. O'Connor, Judge; and a Final Decree thereupon having been filed and entered on October 31st, 1941, in Civil Order Book for the Central Division, No. 7 at page 235 et seq., and in Civil Order Book for the Southern Division, No. 1 at page 482 et seq.; and, pursuant to said Decree, inter alia, the court having ordered that the \$28,-067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, in [2] case No. 1301 O'C Civil, Central Division, on January 29th, 1941, be paid to the Western Loan and Building Company, a corporation, of which said sum of \$28,-067.87, less clerk's fees of one per cent, amounting to \$280.68, or \$27,787.19, was paid by the clerk of the District Court to the Western Loan and Building Company, a corporation, on November 4th, 1941; and

The said F. S. Lack, the defendant in said cause No. 1301, O'C Civil, Central Division, and plaintiff in said cause No. 84 O'C Civil, Southern Division, having appealed from a part of said Decree, and from the order denying his Motion for a new trial, dated and filed March 13th, 1942, to the Circuit Court of Appeals for the Ninth Circuit, to the extent and as more fully set forth in the said Notice of Appeal, dated and filed May 1st, 1942; and the said United States Circuit Court of Appeals having rendered its Opinion, filed April 9th, 1943, in the said court, and reported in 134 Fed. Supp. 1017, and having made its Decree reversing that part of the said judgment appealed from, and

directing the entry of judgment in this court; and the said Mandate of said United States Circuit Court of Appeals for the Ninth Circuit in these two causes bearing date May 29th, 1943, having been duly transmitted to this court, and having been filed and spread on the minutes of this court on the 3rd day of June, 1943, decreeing that that part of the judgment of the said District Court in these two causes, so far as appealed from, be reversed with costs in favor of the appellant, F. S. Lack, and against the appellee, Western Loan and Building Company, a corporation, with directions to the District Court to enter judgment awarding to Western Loan and Building Company, a corporation, the sum of \$19,250.00 of the \$28,067.87 deposited into court by the Pearl Assurance Company, Ltd., a corporation, and awarding F. S. Lack the sum of \$8,817.87 of the said \$28,067.87, and requiring the Western Loan and Building Company, a corporation, to convey to F. S. Lack the [3] Hotel Dunlack Building in Brawley, California, the land on which the Building stood, and affirming that part of the District Court's decree requiring the Western Loan and Building Company, a corporation, to convey and transfer to F. S. Lack all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building, and that the appellant, F. S. Lack, recover against the appellee, Western Loan and Building Company, a corporation, for his costs expended on appeal and taxed by the Circuit Court of Appeals, the sum of \$1122.97; and

This Court having made its interlocutory decree dated December 20, 1943, entered and docketed December 20, 1943, in Book CO 22 at page 451, and having by orders denied all motions by F. S. Lack to amend or re-settle said decree and for other relief;

And said F. S. Lack having appealed from said interlocutory judgment and said orders in the manner and to the extent set forth in the notice of appeal dated and filed March 19, 1944, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said United States Circuit Court having rendered its opinion filed December 30, 1944, in said Court, and having made its decree dismissing said appeal and the mandate of said United States Circuit Court in said causes bearing date of December 30, 1944, having been transmitted to this Court by the United States Circuit Court and said mandate having been duly spread on the minutes of this Court on the 25th day of June, 1945;

And the Court having made Findings of Fact on the issues presented and Conclusions of Law,

Now, upon motion of Henry S. Dottenheim, attorney for F. S. Lack, [4]

It Is Ordered, Adjudged, and Decreed:

1. That the judgment, Findings of Fact and Conclusions of Law herein dated October 31, 1941, be and they are hereby in all respects vacated, set aside, and annulled.

2. That the decree of this Court herein, bearing date of October 31, 1941, and entered October 31,

1941 and docketed October 31, 1941, in Book CO 7, page 235, and Book CO 1, page 482, is hereby insofar as appealed from be and it is in all respects vacated, set aside, and annulled.

3. That the interlocutory decree dated December 20, 1943, entered December 20, 1943, and docketed December 20, 1943, in Book CO 22, page 451, be and it is hereby in all respects vacated, set aside, and annulled.

4. That the said Pearl Assurance Company, Ltd., a corporation, having heretofore deposited with the Clerk of this Court on January 29, 1941, in cause 1301 C. Civil, Central Division, the sum of \$28,067.87, is hereby discharged from all further liability to said Western or to Lack on account of the earthquake damage herein and under its policies Nos. 514753 and 515739.

5. That the sum of \$28,067.87 originally deposited into court by Pearl Assurance Company, Ltd., the sum of \$19,250.00, less Clerk's fees of 1%, amounting to \$192.50, or \$19,057.50, is hereby awarded to Western Loan and Building Company, and the sum of \$8817.87, less Clerk's fees of 1%, amounting to \$88.17, or \$8728.56, is hereby awarded to F. S. Lack in accordance with the said mandate of the Circuit Court of Appeals in these two consolidated cases hereinbefore referred to; and the said sum of \$19,250.00 less Clerk's fees of 1% amounting to \$192.50, or \$19,057.50, having been hereto paid to Western by the Clerk of the District Court on November 4, 1941 by his check for the sum of \$27,789.17, and Western, pursuant to said

mandate of the [5] Circuit Court of Appeals having on or about August 13, 1943, paid to F. S. Lack the sum of \$8729.70 by its check dated August 6, 1943, but not having paid any interest thereon, that F. S. Lack is entitled to recover from Western Loan and Building Company the sum of \$1279.83 with interest thereon to June 25, 1945 at 7% per annum.

6. That said Lack have and recover from said Western the sum of \$1279.83, together with interest at 7% per annum to June 25, 1945 together with costs as taxed by the Court in the sum of \$. and that said F. S. Lack have execution therefor.

7. That said F. S. Lack be and he hereby is granted judgment quieting title in him free and clear of any claim by Western Loan and Building Company, to all of the furniture, furnishings, linens, restaurant equipment and silverware, dishes and all personal property in said leased premises on October 30, 1934, together with the additions and replacements to the same and all personal property in said buildings, and Western Loan and Building Company is not entitled to any of said personal property, and is further granted a judgment quieting in him free and clear of any claim by Western Loan and Building Company, the property described as Hotel Dunlack at Brawley, California, including land, building, furnishings, furniture, fixtures and equipment, and the real estate upon said hotel rested, situate in the City of Brawley, County of Imperial, State of California, and described as follows: Lots Fourteen (14),

Fifteen (15) and Sixteen (16) in Block Seventy-nine (79) of the Townsite of Brawley, in the City of Brawley, County of Imperial, State of California, according to the Map thereof No. 920 filed in the office of the County Recorder of San Diego County; together with easements and appurtenances thereunto belonging.

8. That F. S. Lack has been damaged by Western Loan and Building Company on account of the facts set forth in the findings, in the sum of \$27,690.96, with interest thereon at the [6] rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01.

9. That F. S. Lack have and recover from Western Loan and Building Company the sum of \$27,690.96, together with interest at the rate of 7% per annum from February 3, 1943 to June 25, 1945, to wit, the sum of \$4841.05, or in all the sum of \$32,532.01, and that said F. S. Lack have execution therefor.

10. That this is a final judgment.

Dated this day of June, 1945.

.....

Judge of United States District Court

Rejected July 1, 1945.

J. F. T. O'CONNOR,

Judge

[Endorsed]: Filed July 3, 1945. [7]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW
AND FINAL JUDGMENT TO JUDGE FOR
SIGNATURE.

To M. Perelli-Minetti and H. L. Mulliner, 704 South Spring Street, Los Angeles 14, California, attorneys for Western Loan and Building Company, and to Cooley, Crowley and Supple, 206 Sansome Street, San Francisco, California, attorneys for Pearl Assurance Company, Ltd.:

Please Take Notice that the within are copies of Findings of Fact, Conclusions of Law, and of a final judgment which will be presented to the Honorable J. F. T. O'Connor, Judge of the [8] above entitled Court on Monday, July 2, 1945, at ten o'clock a. m. for signature.

HENRY S. DOTTENHEIM

Attorney for F. S. Lack

Dated: June 20, 1945. [9]

Received copy of the within Final Decree and Notice this 20th day of June, 1945.

H. L. MULLINER AND M.
PERELLI-MINETTI

By M. PERELLI

Attorney for Western Loan
& Bldg. Co.

[Endorsed]: Filed July 3, 1945. [10]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF FINAL
JUDGMENT TO JUDGE FOR SIGNA-
TURE

To John L. Schaefer and Henry S. Dottenheim,
attorneys for F. S. Lack and to Cooley, Crowley
and Supple, attorneys for Pearl Assurance Com-
pany, Ltd.:

Please Take Notice that the within is a copy of
a Final Judgment which will be presented to the
Honorable J. F. T. O'Connor, Judge of the above
entitled Court, on Monday, June 11, 1945, at [11]
10:00 o'clock A. M., for signature.

Dated: May 22, 1945.

H. L. MULLINER AND M.
PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Western Loan
and Building Company

AFFIDAVIT OF SERVICE BY MAIL—1013a,
C. C. P.

State of California,

County of Los Angeles—ss.

Jean Perelli-Minetti, being first duly sworn, says:
That affiant is a citizen of the United States and
a resident of the County of Los Angeles; that
affiant is over the age of eighteen years and is not
a party to the within and above entitled action;

that affiant's business address is 704 South Spring Street, Los Angeles 14, Calif., that on the 21st day of May, 1945, affiant served the within Notice of Presentation of Final Judgment to Judge for Signature and Final Judgment on the plaintiff & defendant, F. S. Lack & defendant, Pearl Assurance Company in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiff and defendants. at the office address of said attorneys, as follows: Henry S. Dottenheim, 444 N. Camden Dr., Beverly Hills, Calif. Cooley, Crowley and Supple, 617 S. Olive St., Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

JEAN PERETTI-MINETTI

Subscribed and sworn to before me this 21st day of May, 1945.

[Seal]

LOUISE KOEHLER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 23, 1945. [13]

In the United States District Court, Southern District of California, Central Division.

In Equity

No. 1301 Civil O'C

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Plaintiff,

vs.

F. S. LACK, PEARL ASSURANCE COMPANY, LTD., a Corporation,

Defendants,

In Equity

No. 84 S. D. Civil O'C

F. S. LACK,

Plaintiff,

vs.

WESTERN LOAN AND BUILDING COMPANY, a Corporation,

Defendant.

FINAL JUDGMENT

The above entitled cases were joined for trial and tried together in the above entitled court and judgment entered hereon October 31, 1941. Thereafter appeal therefrom was taken by S. F. Lack, to the United States Circuit Court of Appeals for the Ninth Circuit.

On or about April 9, 1943 the said Ninth Circuit Court filed Its opinion in which the judgment of the above entitled court was in part reversed, and mandate of the Circuit Court was issued May 29, [14] 1943 and filed in this Court, June 3, 1943.

On December 20, 1943, this Court entered a decree termed "Interlocutory Decree Pursuant to Mandate of the Circuit Court of Appeals". Thereafter and after denial by this Court of Lack's motion to "resettle and amend" said decree Lack filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said interlocutory decree.

And on December 30, 1944 the said Circuit Court filed its opinion dismissing said appeal and its Decision and Its Mandate filed in this Court directed the entry of Judgment herein in accordance with the Mandate of the said United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the Mandate dated May 29, 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cases, is as follows:

"United States of America, ss:

The President of the United States of America
To the Honorable the Judges of the District Court
of the United States for the Southern District
of California, Central Division, Greeting

Whereas, lately in the District Court of the

United States for the Southern District of California, Central Division, before you, or some of you, in cause between Western Loan and Building Company, plaintiff, and F. S. Lack and Pearl Assurance Company, defendants, In Equity, No. 1301, and in a cause between F. S. Lack, plaintiff, and Western Loan and Building Company, defendant, Civil Action No. 84, a decree was duly filed and entered in each of above causes on the 31st day of October, 1941, *which said decree* which said decree is of record and fully set out in said causes in the [15] office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by S. F. Lack, as appellant, against Western Loan and Building Company and Pearl Assurance Company, Ltd., a corporation, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears;

And Whereas, on the 1st day of December in the year of our Lord One Thousand Nine Hundred and forty-two the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted;

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause so far

as appealed from be, and hereby is, reversed with costs in favor of the appellant and against the appellee, Western Loan & Building Co., and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment awarding to Western Loan & Building Co. \$19,250 of the \$28,067.87 deposited by Pearl Assurance Co. in the registry of the court, awarding to Lack the balance (\$8,817.87) of said \$28,067.87 and requiring Western Loan & Building Co. to convey to Lack the Hotel Dunlack, building in Brawley, California, the land on which the building stood, and all furniture, furnishings, fixtures and equipment, including linens, dishes, silver and restaurant equipment located in the building.

It is further ordered, adjudged, and decreed by this Court, that the appellant, recover against the appellee, Western Loan & Building Co., for his costs herein expended, and have execution therefor.

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as according to right and [16] justice and the laws of the United States ought to be had.

Witness, the Honorable Harlan Fiske Stone,
Chief Justice of the United States, the 29th day of

May in the year of our Lord One Thousand Nine Hundred and forty-three.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of costs allowed and taxed in favor of appellant and against appellee, Western Loan and Building Co., as per Annexed Bill of Items, taxed in detail: \$1122.97.

PAUL P. O'BRIEN,

Clerk

That the Interlocutory Decree of this entered December 20, 1943 is hereby vacated.

That judgment be and hereby is entered on, pursuant to, and in accordance with the foregoing Mandate of the Circuit Court, the terms thereof being hereby incorporated herein and made a part hereof.

It is further ordered that the records of this Court show, as recited in the said interlocutory decree, that Western Loan and Building Company following said mandate of May 29, 1943, has and did perform all acts required by said mandate and this decree.

That said Western Loan and Building Company has complied with and satisfied this Judgment.

This is a Final Judgment.

Dated at Los Angeles, California, this 2 day of July, 1945.

J. F. T. O'CONNOR,

Judge of the United States
District Court

Judgment entered July 2, 1945.

Docketed July 2, 1945.

Central Co. Book 33, page 603; Southern Co.
Book 10, page 717.

EDMUND L. SMITH,
Clerk

By FRANCIS E. CROOR,
Deputy

[Endorsed]: Filed July 2, 1945. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Western Loan and Building Company, a Corporation, and to its attorneys herein and to the above entitled Court:

Notice Is Hereby Given that F. S. Lack, defendant in the first above entitled action and plaintiff in the second above entitled action, which actions have been consolidated in the trial Court, does hereby appeal to the United States Circuit Court of [18] Appeals, for the Ninth Circuit, from the "Final Judgment" heretofore made and entered herein on

the 2nd day of July, 1945, and hereby appeals from the order and orders of the District Court, to wit: the trial Court herein, denying to the defendant F. S. Lack, his motions and applications for amendments to the "Interlocutory" Decree herein and from the refusal of the trial Court to hear or consider or make findings on the application of F. S. Lack and the refusal of the trial Court to make or enter a judgment herein with respect to the issue of damages claimed by the defendant F. S. Lack herein as against Western Loan and Building Company.

That said appeal will be taken both as to law and fact and from the whole of the judgment and in particular for the failure and refusal of the Court to find and determine on the question of damages sustained by F. S. Lack as against the Western Loan and Building Company.

Dated this 28th day of September, 1945.

HARRY W. HORTON

Attorney for Appellant, F. S.
Lack. [19]

AFFIDAVIT OF SERVICE BY MAIL

1013a, C. C. P.

State of California,
County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over

the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 218 Rehkopf Building, El Centro, California; that on the 28th day of September, 1945, affiant served the within notice of appeal on the attorneys for Western Loan and Building Company, in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Western Loan and Building Company, at the office/residence address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. BOYER.

Subscribed and sworn to before me this 28th day of September, 1945.

[Seal] GEORGE R. KIRK

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed Oct. 1, 1945. [20]

[Title of District Court and Cause.]

STATEMENT OF F. S. LACK OF POINTS
UPON WHICH SAID APPELLANT IN-
TENDS TO RELY WITH RESPECT TO
HIS APPEAL

F. S. Lack having taken and filed an appeal herein from the "Final Judgment" and from the orders and refusals of the trial Court to amend the Interlocutory Decree and to make and [21] file written findings of fact and conclusions of law and in particular the refusal of the trial Court to include a determination of the damages claimed by F. S. Lack as against Western Loan and Building Company and said F. S. Lack having designated the record upon appeal herein, hereby designates the points upon which the said F. S. Lack intends to rely upon his appeal and designates the same as follows:

1. That the United States District Court erred in making and entering the Interlocutory Decree herein and in particular in failing to include in said decree or its judgment and decree in these consolidated cases a finding and determination of the issue of damages claimed by F. S. Lack as against Western Loan and Building Company.

2. The refusal of the trial Court upon the application of F. S. Lack to amend the Interlocutory Decree or to permit there being submitted on behalf of F. S. Lack the issue of damages claimed by Lack as against Western Loan and Building Company.

3. The refusal of the trial Court to make or sign findings of fact and conclusions of law and in particular the rejection by the trial Court of the findings of fact and conclusions of law, or any part thereof, submitted and proposed by F. S. Lack.

4. The error of the trial Court in signing and filing herein a purported "Final Judgment" without findings of fact and conclusions of law being made, and the refusal of the trial Court to include in any final determination or judgment herein a determination of the issue of damages claimed by F. S. Lack as against Western Loan and Building Company.

Dated this 3rd day of October, 1945.

HARRY W. HORTON,

Attorney for Appellant, F S.
Lack. [22]

AFFIDAVIT OF SERVICE BY MAIL

1013a, C.C.P.

State of California,
County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 218 Rehkopf Building, El Centro, California; that on the 3rd day of October, 1945, affiant served the within Statement of Points of appellant upon appeal on the Western

Loan and Building Company, a corp., in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said company, at the office/residence address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) "M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. BOYER

Subscribed and sworn to before me this 3rd day of October, 1945.

[Seal] **GEORGE R. KIRK**

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed Oct. 4, 1945. [23]

[Title of District Court and Causes.]

**DESIGNATION OF CONTENTS OF RECORD
UPON APPEAL**

In the above entitled actions consolidated in the trial Court, F. S. Lack, as defendant in the first

above entitled cause, and as plaintiff in the second above entitled cause, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the "Final Judgment" made and entered on or [24] about the 2nd day of July, 1945, and having appealed to said Court from the rulings of the trial Court denying F. S. Lack his motions and applications for amendments to the "Interlocutory Decree" and from the refusal of the trial Court to hear or consider or make findings or render a judgment upon the application of F. S. Lack upon the issues of damages claimed by the said F. S. Lack as against Western Loan and Building Company, as said appellant, does hereby designate the portions of the record and proceedings to be contained in the record upon appeal and hereby requests the Clerk of this Court under his hand and the seal of this Court to prepare and transmit to said Appellate Court a true copy of the records hereinafter designated.

That this appeal is taken upon the records and proceedings had in the above consolidated cases, inclusive of the judgment roll, in the proceedings had in the trial Court subsequent to the entry of the original judgment against the said F. S. Lack, which judgment was appealed from and set aside. That the proceedings subsequent to said original judgment include the Interlocutory Decree, the application of F. S. Lack to amend the Interlocutory Decree, and the order of Court refusing the application and striking, on the motion of Western Loan and Building Company, the portions of the

application so ordered stricken, the proposed findings of fact and conclusions of law and final judgment offered by F. S. Lack and refused by the trial Court and the purported "Final Judgment" entered on or about July 2, 1945.

That inasmuch as there is now on file in the United States Circuit Court of Appeals for the Ninth Circuit the record upon appeal from the original judgment against F. S. Lack and there is also on file in said court of appeals the record of the proceedings as to the "Interlocutory Decree", there is hereby designated as a part of the record upon this appeal said record [25] in each of said appeals and in addition thereto the following:

1. The Interlocutory Decree.
2. The motion on behalf of F. S. Lack to amend the Interlocutory Decree and for the inclusion in the judgment or decree of the trial Court after decision on the first appeal herein of the issues relative to damages sustained by F. S. Lack as against the Western Loan and Building Company.
3. The motion of Western Loan and Building Company to strike portions of the motion of F. S. Lack to amend the Interlocutory Decree and include a determination of the damages claimed by F. S. Lack.
4. The order of the trial Court granting the motion of Western Loan and Building Company to strike and denying the application of F. S. Lack

to amend the Interlocutory Decree and include a determination of the damages claimed by F. S. Lack.

5. The proposed findings of fact and conclusions of law and judgment proposed by and on behalf of F. S. Lack and rejected by the trial Court.

6. The "Final Judgment" entered and ordered July 2, 1945.

7. The minutes of the Court and the Reporter's transcript of the proceedings before the trial Court on behalf of F. S. Lack in connection with the foregoing motions and orders.

Dated this 3rd day of October, 1945.

HARRY W. HORTON

Attorney for Appellant, F. S.
Lack. [26]

AFFIDAVIT OF SERVICE BY MAIL—1013a
C. C. P.

State of California,

County of Imperial—ss.

L. Boyer, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Imperial; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is 218 Rehkopf Building, El Centro, California; that on the 3rd day of

October, 1945, affiant served the within Designation of contents of record upon appeal on the Western Loan and Building Company, a corp. in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said company, at the office/residence address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "M. Perelli-Minetti, 704 S. Spring Street, Los Angeles, California, and H. L. Mulliner, 817 Continental Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at El Centro, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. BOYER

Subscribed and sworn to before me this 3rd day of October, 1945.

[Seal]

GEORGE R. KIRK

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed Oct. 4, 1945. [27]

[Title of District Court and Causes.]

STIPULATION AS TO RECORD UPON
APPEAL

This stipulation made and entered into by and between F. S. Lack in the above consolidated cases, and Western Loan and Building Company in the above entitled consolidated cases, is hereby agreed to be as follows: [28]

The above designated parties hereto, for the purpose of minimizing the record to be required to be printed as and for the record upon appeal herein, do hereby stipulate as follows:

It Is Hereby Stipulated that on behalf of Western Loan and Building Company the following reservation is hereby made, to wit: that this stipulation is made without admitting that any of the records hereinafter referred to have any materiality or relevancy upon this attempted appeal and without admitting the right of the appellant herein to take the appeal to which this stipulation relates, and without admitting that this attempted appeal is within time and without waiving any rights of Western Loan and Building Company to file objections to said appeal or a motion to dismiss the same, said appellee stipulates with appellant as follows:

It Is Hereby Stipulated that in the above entitled consolidated cases an appeal was heretofore taken from the original judgment in said consolidated cases and that the record upon appeal in said case was printed and is the printed record as contained

in case No. 10158 of the United States Circuit Court of Appeal for the Ninth Circuit.

That thereafter a record was prepared upon an appeal attempted to be taken from an Interlocutory Decree and from the failure and refusal of the trial Court to amend or modify said Interlocutory Decree pursuant to an application of F. S. Lack upon which attempted appeal the same was dismissed in the United States Circuit Court of Appeal for the Ninth Circuit upon the motion and application of Western Loan and Building Company. That in said attempted appeal the record upon appeal was printed and is on file in the United States Circuit Court of Appeals for the Ninth Circuit.

That the record in each and both of said appeals, [29] to wit: said appeal in said cause No. 10158 of the United States Circuit Court of Appeals for the Ninth Circuit, and said attempted appeal from said Interlocutory Decree, as the same are on file in said Circuit Court of Appeals for the Ninth Circuit, may be considered as a part of the record upon appeal herein without said record or transcripts being printed or re-printed and reference thereto may be had as a part of the record on appeal herein purely by reference.

That in addition thereto there shall be printed as the remaining portion of the record upon appeal herein the following documents, to wit:

1. The notice of presentation of Findings of Fact and Conclusions of Law and Final Judg-

ment, dated June 20, 1945, with proposed Findings of Fact, Conclusions of Law and Final Judgment attached thereto, presented on July 2, 1945, on behalf of appellant, F. S. Lack.

2. The notice of presentation of Final Judgment presented by Western Loan and Building Company with proposed Final Judgment attached, which was presented July 2, 1945, and adopted and signed by Judge O'Connor of United States District Court.

3. Notice of Appeal filed by and on behalf of F. S. Lack October 1, 1945.

4. Designation of the record and documents to be included in the transcript upon appeal herein.

5. A Statement of Points to be urged on behalf of appellant, F. S. Lack upon the appeal herein.

6. A copy of this Stipulation as to record upon appeal herein.

Dated this 23rd day of October, 1945.

HAROLD W. HORTON

Attorney for Appellant, F. S.
Lack.

M. PERELLI-MINETTI

Attorney for Appellee,
Western Loan and Building
Company.

[Endorsed]: Filed Nov. 1, 1945. [31]

[Title of District Court and Causes.]

ORDER EXTENDING TIME FOR DOCKET-
ING OF RECORD ON APPEAL.

Sufficient cause appearing therefor, it is hereby ordered that the time for the preparation and docketing of the record upon appeal in the above entitled consolidated matters is hereby extended for a period of twenty (20) days from November 10, 1945.

Dated November 7, 1945.

J. F. T. O'CONNOR
Judge.

[Endorsed]: Filed Nov. 7, 1945. [32]

[Title of District Court and Causes.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32 inclusive contain full, true and correct copies of Proposed Form of Final Decree; Notice of Presentation of Findings of Fact and Conclusions of Law and Final Judgment to Judge for Signature; Notice of Presentation of Final Judgment to Judge for Signature; Final Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Stipulation as to Record on Appeal and

Order Extending Time for Docketing Record on Appeal which, together with records on appeals from original judgment and interlocutory Decree, pursuant to stipulation of counsel, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$10.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8th day of November, 1945.

[Seal] EDMUND L. SMITH,
Clerk

By THEODORE HOCKE
Chief Deputy Clerk.

[Endorsed]: No. 11179. United States Circuit Court of Appeals for the Ninth Circuit. F. S. Lack, Appellant, vs. Western Loan and Building Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 13, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

WESTERN LOAN AND BUILDING COM-
PANY, a Corporation,

Plaintiff and Appellee,

vs.

F. S. LACK,

Defendant and Appellant,

F. S. LACK,

Plaintiff and Appellant,

vs.

WESTERN LOAN AND BUILDING COM-
PANY, a Corporation,

Defendant and Appellee,

DESIGNATION OF RECORD ON APPEAL

In the above entitled actions consolidated in the trial Court, F. S. Lack, as defendant in the first above entitled action and as plaintiff in the second above entitled action, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, does hereby in the above entitled Court designate the record upon appeal herein to be as follows, being the same record as designated in the trial Court:

Designation of Record on Appeal

Final Judgment

Final Decree (Proposed Form, Lack's)

Names and Addresses of Attorneys

Notice of Appeal

Notice of Presentation of Final Judgment to
Judge for Signature, Western's

Notice of Presentation of Findings of Fact and
Conclusions of Law and Final Judgment to Judge
for Signature, Lack's

Statement of Points on Appeal

Stipulation as to Record on Appeal

Designation of Record in the United States Cir-
cuit Court of Appeals for the Ninth Circuit

Statement of Points upon which Appellant will
rely.

Dated November 14, 1945.

HARRY W. HORTON

Attorney for F. S. Lack, Ap-
pellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 16, 1945. Paul P.
O'Brien, Clerk.

